NO. 53

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

JAMES CLEVELAND BURGETT,
Petitioner

v.

THE STATE OF TEXAS,
Respondent

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF FOR RESPONDENT

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas is reported in 397 S.W.2d 79 (Appendix "A").

JURISDICTION

Petitioner seeks jurisdiction under 28 U.S.C. 1254(1) and the Fourteenth Amendment to the Constitution of the United States.

The State respectfully submits that this Honorable Court should not take jurisdiction, because no Federal

question is presented. Less than a year ago, this Court so held in *Spencer v. The State of Texas,* 385 U.S. 554, 87 S.Ct. 648.

QUESTIONS PRESENTED

1. The main question for this Court to decide is whether evidence of prior convictions, not shown to to be void, offered into evidence but withdrawn from the jury presents a Federal question.

2. Whether petitioner with a pending case is entitled as a matter of right to sit in the court room when the jury panel is being questioned on a totally unrelated case.

STATEMENT

The proof showed that Burgett was in the Hunt County jail. After the jailer permitted him to make a telephone call, he attacked the jailer with a knife.

Burgett was indicted for assault with intent to murder with malice with four prior felony convictions alleged for enhancement purposes under Article 63, *Vernon's Annotated Texas Penal Code* (Appendix "B"). The district attorney offered records of a Tennessee conviction for forgery and a Dallas County, Texas, conviction for burglary with intent to commit theft. The trial court did not admit the Texas conviction (State's Exhibit 8, R. 41, 52), and the evidence of the Tennessee conviction was withdrawn from the jury (R. 11-12). No prior conviction was used to enhance punishment.

Petitioner did not make a motion to quash the indictment on the grounds that the prior convictions

were void. Such was available under Article 760e, *Vernon's Annotated Code of Criminal Procedure,* Acts 51st Leg., p. 817, Ch. 463, Sec. 1 (Appendix "C"). Facts could have been developed on the issue prior to trial. Article 759a, Sec. 6, *Vernon's Annotated Code of Criminal Procedure,* Acts 1951, 52nd Leg., p. 819, Ch. 465 (Appendix "C"). The only motion to quash was on the ground that it was not known what the State expected to prove.

ABSENCE DURING VOIR DIRE

Burgett was in the court room during all of the voir dire examination of the jury. His counsel correctly points out in his brief that the trial was held on Thursday. On Monday of that week an unrelated case went to trial. Counsel for petitioner participated in that case (R. 62-63). Petitioner's counsel was not prohibited from interrogating the jury panel (R. 60). The opinion of the Court of Criminal Appeals (Appendix "A") correctly sets out what transpired.

ARGUMENT

Burgett was convicted for assault with intent to murder with malice. There was no enhancement of penalty. No prior conviction nor "repetition of offense" was submitted to the jury. The court in its charge instructed the jury:

> "You are further instructed that the State during the trial of the case offered evidence that might be considered as tending to show the commission of other offenses prior to the 15th day of April, 1964, that all such evidence is withdrawn from you and you will not consider such evidence for any purpose whatsoever in arriving

at your verdict. You should not mention or discuss in your deliberations such evidence or that portion of the indictment read to you attempting to charge such prior offenses." (R. 11-12)

The penalty for assault with intent to murder with malice is set out in Article 1160, *Vernon's Annotated Texas Penal Code* (Appendix "E") and is not less than two nor more than twenty-five years (as amended, Acts 1961, 57th Leg., Ch. 331, p. 706).

If one prior conviction of petitioner had been successfully used, the penalty would have been, as a matter of law, twenty-five years. Article 62, *Vernon's Annotated Texas Penal Code* (Appendix "F").

The opinion of the Court of Criminal Appeals stated that no bad faith was shown on the part of the district attorney in offering evidence of prior convictions. The State offered to stipulate the prior convictions out of the presence of the jury, but respondent would not agree. An incorrect ruling by the trial court in sustaining the objection to the burglary conviction prevented the State from going forward with proof of the Tennessee convictions. The record does not show the convictions to be invalid.

When the evidence of the Dallas County conviction was offered, objection was sustained by the trial court on the grounds that the sentence read "not less than 2 nor more than 33 years." The certified record at page 83 will show that one of the 3's was very dim and apparently was intended to be erased. When the record was printed, the sentence read "not less than 2 nor more than 3 years" (R. 54). Even though the sentence might have been read "not less than 2 nor more than 33 years," it could have been reformed

on appeal. Article 847, *Vernon's Annotated Code of Criminal Procedure,* 1925 (Appendix "G"), which was in effect at the time of this trial. It was definitely shown in the judgment the penalty assessed. The Court of Criminal Appeals has held that where a judgment and sentence could have been reformed on appeal it could not be attacked collaterally on habeas corpus. *Ex Parte Pitrucha* (1953), 158 Tex.Cr.R. 426, 256 S.W.2d 415.

In *Palacio v. State* (1957), 164 Tex.Cr.R. 400, 299 S.W. 2d 944, the verdict and judgment showed the penalty assessed was seven years. The sentence read "not less than 2 nor more than 5." The sentence was reformed on appeal to read "not less than 2 nor more than 7."

The indictment shows that all of the forgery convictions in Tennessee were on the same date, and the State could not use them under Article 63 of the *Penal Code* (the habitual criminal statute) (Appendix "B"). In order to invoke the provisions of this Article, it is necessary that each succeeding conviction be subsequent to the previous conviction, both in point of time of the commission of the offense and the conviction therefor. *Cowan v. State* (1962), 172 Tex.Cr.R. 183, 355 S.W.2d 521.

Article 62 of the *Penal Code* (Appendix "F") prevented the use of the Tennessee convictions, or either of them, because they were for forgery and were not of the same nature as the primary offense in this case, which was assault with intent to murder. The State could not, as a matter of law, proceed with the Tennesee convictions after the trial court had erroneously ruled out the Dallas County conviction. When the Dal-

las County conviction was ruled out, no motion for mistrial was made.

Petitioner assumes that the Tennessee conviction was void, because one of the instruments shows that he was without counsel (State's Exhibit 5, R. 42, and State's Exhibit 6, R. 43).

The present case was tried on April 29, 1965, prior to *Greer v. Beto,* 384 U.S. 69, 86 S.Ct. 1477, which was decided by this Court on May 23, 1965.

There has been no showing that Burgett was indigent at the time of trial. Petitioner did not have counsel during the trial. The fact that a judgment is silent as to counsel does not of itself show non-waiver.

The law and the practice in Tennessee regarding counsel make a strong presumption for the validity of the prior convictions. As far back as 1855, Tennessee statutes required appointment of counsel if an accused was unable to employ counsel. Apparently this was true even in misdemeanors.

Sec. 40-2002, Chapt. 20, p. 481, of the *Tennessee Code Annotated,* 1956, reads as follows:

> "Every person accused of any crime or misdemeanor whatsoever, is entitled to counsel in all matters necessary for his defense, as well as to facts as to law."

Sec. 40-2003 reads:

> "If unable to employ counsel, he is entitled to have counsel appointed by the court."

In *Polk v. State* (1936), 170 Tenn. 370, 94 S.W.2d 394, the Supreme Court of Tennessee reversed a judg-

ment, because, among other grounds, a justice of the peace at arraignment did not advise accuseds of their right to aid of counsel in every stage of the proceeding in accordance with the Constitution and statutes.

In the case of *Cogdell v. State* (1951), 246 S.W.2d 5, the Supreme Court of Tennessee cited *Johnson v. Zerbst,* 304 U.S. 458, 58 S.Ct. 1019, 1023, where it was stated in an opinion by Mr. Justice Black:

> "The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused."

The case of *Snell v. United States* (10th Cir.), 174 F.2d 580, 581, was cited. It held a duty is imposed on the trial judge to determine whether there has been a competent and intelligent waiver by the accused.

Very few cases are found contending right to counsel during the trial has been denied.

In *Melton v. Bomar* (1957), 201 Tenn. 453, 300 S.W. 2d 875, habeas corpus was denied, because, if there was a conflict of interest between two defendants, separate counsel was appointed to defend Melton. *Johnson v. State* (1963), 213 Tenn. 372, 372 S.W. 2d 192, was reversed because one attorney withdrew and newly appointed counsel did not have sufficient time to prepare for trial.

Chandler v. Fretag (1954), 348 U.S. 3, 75 S.Ct. 1, was tried in Tennessee. It was reversed. The accused stated he did not want counsel. When he was first notified at the trial that he was being tried as an ha-

bitual criminal, he asked for counsel; his request was denied.

Other Tennessee cases have not been found by the writer concerning denial of counsel at the time of trial. This would indicate a denial of right to counsel is not a problem in that state. A check of the opinions of the 6th Circuit, Vols. 305 through 374 F.2d shows no cases reversed because of lack of counsel. Some two or three were reversed because counsel was not given adequate time to prepare for trial.

Two Law Review articles indicate that the spirit of the Constitution and statutes of Tennessee is being followed. 31 *Tenn. Law Review* 300, "The Right to Counsel for the Indigent Defendant in Tennessee"; 30 *Tenn. Law Review* 420, "The Right to Counsel in Criminal Prosecutions."

Since 1965, Tennessee has required waiver of counsel to be in writing. Sec. 2, Chapt. 217, p. 646, *Public Acts of the State of Tennessee,* 84th General Assembly, 1965, provides:

> "Be it further enacted, That no person in this state shall be allowed to enter a plea to an indictment or presentment charging a felony when such person is not represented by counsel, unless such person has in writing expressly waived his right to the assistance of counsel."

The rule in *Carnley v. Cochran,* 369 U.S. 506, 82 S.Ct. 884, and *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, is recognized, but these were attacks on lower court judgments squarely before this Court, not on a collateral prior conviction judgment. To require proof of waiver of counsel and other constitutional rights in previous convictions (especially out of state convic-

tions) would in most instances make our recidivist statutes ineffective, and it would be tantamount to requiring a new trial or retrial of practically all prior convictions.

Many printed forms of judgments recite that a defendant and his counsel were present. If a judgment used as a prior conviction for enhancement or for impeachment purposes recited counsel present and was offered by the State and objection was made for the first time that there was actually no counsel present, petitioner's contention, if upheld, would require a reversal even though it was offered in good faith.

It is possible that Burgett wanted to represent himself, that he did not want counsel. He did a creditable job in getting this Court to grant the writ of certiorari. Of course, counsel cannot be forced upon him. *Carter v. People of Illinois,* 329 U.S. 173, 174, 67 S.Ct. 216, 218; *Moore v. State of Michigan,* 355 U.S. 155, 161, 78 S.Ct. 191, 195.

It should be remembered the court instructed the jury not to consider any of the prior convictions, including the Tennessee conviction, and they were not used. The instruction was presumed to have been followed. *Spencer v. Texas,* 385 U.S. 554, 87 S.Ct. 648.

In *Rice v. Olson,* 324 U.S. 786, 65 S.Ct. at 990, a plea of guilty was entered in a burglary trial; it was contended he was not advised of his right to assistance of counsel and had not waived that right. This Court denied relief and ordered a hearing on waiver. In the present case, there was a plea of guilty. Burgett says he did not have counsel; he does not claim he had not waived that right. Here, as in *Rice v. Olson,* there was

a guilty plea in a state which has required appointment of counsel when an accused was unable to employ one. Counsel was actually waived (Appendix "J").

No hearing should be required, because the matter was withdrawn from the jury.

Petitioner contends that there was no opportunity to challenge the prior convictions prior to the trial on the merits. He cites *McGowen v. State* (1956), 163 Tex.Cr.R. 587, 290 S.W.2d 521. This case does not support his contenton, because it merely held that the trial court did not err in not postponing the trial so the prior convictions could be attacked by habeas corpus. It was held as a matter of law that the former conviction was not invalid. It is submitted by the State that a motion to quash the indictment or that part of the indictment alleging the prior convictions could have been attacked under Article 760e and Article 759a, Sec. 6, of the *Code of Criminal Procedure* (Appendices "C" and "D"). No attempt was made to do so. For the first time in the motion for new trial, he stated that his motion to quash the indictment was to challenge the prior convictions. This was never mentioned prior to the verdict of guilty. This procedure, if permitted, would allow a free ride on the first trial with an assurance of reversal if found guilty.

Petitioner complains that Texas has no procedure to suppress evidence. At the time of the trial, this was true, but, as heretofore pointed out, he had the procedure to quash the indictment. Since January 1, 1966, Texas has had a motion to suppress evidence, Article 28.01, *Code of Criminal Procedure,* 1965 (Appendix "H"). Also, it is pointed out in *Spencer v.*

Texas that records of prior convictions of felonies less than capital have not been read to the jury prior to the finding of guilt under Article 30.07, *Code of Criminal Procedure* (January 1, 1966). Now, even in capital cases, prior convictions are not made known to the jury until the penalty trial. Article 37.07, *Code of Criminal Procedure* (as amended, effective August 28, 1967, Appendix "I").

Complaint is made that the trial court, upon the motion of the district attorney, instructed counsel for petitioner not to mention the penalty of life under the habitual criminal statute. Of course, that went out of the case when the trial court instructed the jury not to consider the Dallas County and Tennessee convictions. No harm is shown petitioner. If one is found guilty of the primary offense and two prior convictions, his penalty is automatically assessed at life. The jury has nothing to do with the assessment of punishment. If this contention is held to be with merit, then in a state proceeding where the court assesses the penalty or in a Federal criminal trial counsel for a defendant could, in effect, tell the jury not to convict because of the large penalty the courts could assess. It is submitted that this complaint is without merit.

The State further submits that no harm is shown. Burgett received only ten years; the jury knew, or must have known, that he was being held on another offense, because he was in jail when he was permitted to make a telephone call, and on the way back to his cell he attacked the jailer with a knife and attempted to escape. Under this record, life could have been assessed.

Petitioner contended that he should have been pres-

ent when the voir dire examination of the jury panel was being conducted in a totally unrelated case on Monday when his case was not tried until Thursday. The opinion of the Court of Criminal Appeals and the statement of petitioner as to what transpired are correct.

The State submits that to adopt this contention every prisoner or accused subject to having his case heard by part of the jury panel would have to be brought to the court room during all voir dire examination of other trials. No rights of Burgett were violated. See *Welch v. Holman* (1965, M. D. Ala., N. D.), 246 F. Supp. 971.

CONCLUSION

The respondent, the State of Texas, submits that there is no substantial Federal question, that the prior convictions complained of were not used in evidence. The court instructed the jury not to consider them. An incorrect ruling by the trial court prevented the State from going forward with the Tennessee conviction. No harm was shown to petitioner, because he could have received life imprisonment instead of ten years.

This Court did not have the full record before it when certiorari was granted. Since no substantial Federal question nor due process issue is presented, it is respectfully submitted that this Court should hold that the writ of certiorari was improvidently granted. *Phillips v. New York,* 362 U.S. 456; *Atchley v. California,* 366 U.S. 207; and *Baldonado v. California,* 366 U.S. 417.

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APPENDIX "A"

James Cleveland (Jimmy) Burgett, Appellant
No. 38,860, v. Appeal from Hunt County
The State of Texas, Appellee

OPINION

The offense is assault with intent to murder; the punishment, ten years.

The state's evidence shows that the prosecuting witness, Weldon E. Bradley, was a deputy sheriff in charge of the jail in Hunt County. Appellant was a prisoner and inmate in the jail.

Bradley testified that on the day in question appellant called him around 5 p.m. and said that he wanted to use the telephone. Thereupon, the witness went to appellant's cell and brought him out to the office area, where he used the telephone. After the call was completed, Bradley started back to the cell with appellant. When he stopped at a control box, appellant attacked him with a knife, and a scuffle ensued between them. In describing the assault committed upon him by appellant, Officer Bradley testified as follows:

> "Well he was cutting at my throat three or four times with the knife * * *
>
> "He was swinging like this.
>
> "* * * he was standing in front of me then and he was just swinging in an arc like that."

He further stated that the knife was traveling at a fast rate of speed when being swung at his throat and that he was in fear of his life, and also that appellant's thrusts with the knife were from the witness's left ear to under his chin and that he received a wound be-

hind the left ear about 1¼ inches long and ⅛ inch deep. The officer further testified that before appellant was subdued he "slid the knife down and said, "'I give up.'" The knife was then recovered by a trusty and was introduced in evidence at the trial as state's exhibit No. 4. The knife, as described in the testimony, was shown to have a blade approximately 1¾ inches in length and sharp enough to cut a person.

Dr. James E. Nicholson, upon being called as a witness by the state, testified that there were certain vital organs in the neck of a human being, including the jugular vein, and, based upon a hypothetical question describing the assault made by appellant upon the officer, expressed the opinion that it was made with a means calculated to produce death. The doctor further testified that had such an arc with the knife as described been slightly deeper it could have produced death by severing the jugular vein.

Appellant did not testify but called his cell mate as a witness who gave no testimony which shed any light on the manner of the assault.

Appellant predicates his appeal upon eight points of error.

Points of error Nos. one through seven present appellant's contentions that the court erred in overruling his motion to quash certain paragraphs in the indictment alleging prior convictions for the purpose of enhancement, and in permitting the state to read such allegations to the jury. Complaint is also made to the admission in evidence, over appellant's objection, to certain records offered by the state in proof of some of the prior alleged convictions.

The record reflects that no action was taken by the court on appellant's motion to quash the enhancement allegations in the indictment. The record further shows that while the court permitted the state to offer proof as to some of them, the truth or falsity of the enhancement allegations was not submitted to the jury. The court submitted to the jury only the issue of appellant's guilt of the primary offense, and in the charge withdrew from the jury's consideration the evidence offered to prove the prior offenses and conviction and instructed the jury as follows:

> "You should not mention or discuss in your deliberations such evidence or that portion of the indictment read to you in attempting to charge such prior offenses."

There is no showing of bad faith on the part of the state in alleging or attempting to prove the prior convictions.

In view of such instructions by the court and no enhancement having been made as a result of the jury's verdict, no error is presented. Butler v. State, 271 S.W. 2d 658; Thomas v. State, 353 S.W. 2d 463.

Point of error No. 8 presents appellant's contention that the court erred in overruling his motion for new trial on the ground that he was not present during the voir dire examination of the jury panel on Monday before his case was called for trial on Thursday.

This is a matter which must be presented by a formal bill of exception, and in the absence thereof such contention is not properly before us for review. Beard v. State, 305 S.W. 2d 291; Welch v. State, 373 S.W. 2d 497. We observe, however, that the record shows that

the jury panel reported on Monday, at which time a jury was selected to try another criminal case set for trial on that date. After the jury was selected, the balance of the panel was instructed to return for jury service on Thursday. On Thursday, the panel did return, together with three additional members who had not been examined on Monday. Thereupon, the jury panel was examined in the presence of appellant and the jury selected which served in the case. The record affirmatively reflects that appellant was present during all stages of the trial. If the contention was properly before us for review, no error would be presented.

Finding the evidence sufficient to support the conviction, and no reversible error appearing, the judgment is affirmed.

DICE, Judge

(Delivered December 15, 1965.)

Opinion approved by the court.

APPENDIX "B"

Art 63, *Vernon's Annotated Penal Code of the State of Texas.*

"Art. 63. *Third conviction for felony.*

"Whoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary.

APPENDIX "C"

Art. 760e, *Vernon's Annotated Code of Criminal Procedure of the State of Texas,* as amended Acts 1951, 52nd Leg., p. 817, ch. 463.

"Art. 760e. *Motions, exceptions and statement of facts constitute bill of exceptions.*

"All motions for change of venue, motion for new trial based on jury misconduct or that the jury received new evidence during deliberations, exceptions to the indictment or information, motions to set aside an indictment or information, motions to quash a venire or jury panel, or motions for continuance together with any answer thereto, the court's order thereon showing defendant's exception to the ruling, together with a Statement of Facts, where facts were adduced in connection therewith shall constitute the defendant's Bill of Exception, and no formal Bill of Exception need be prepared and filed. Provided, however, that the defendant may file a formal Bill of Exception."

APPENDIX "D"

Art. 759a, *Vernon's Annotated Code of Criminal Procedure of the State of Texas,* as amended Acts 1951, 52nd Leg., p. 819, ch. 465.

"Art. 759a. *Statement of facts and bills of exception*

* * * *

"*Statements of facts relating to motions.*

"Sec. 6. This Statute shall apply to all Statements of Fact relating to any Motion heard in the case, but the facts adduced in connection with any Motion shall be filed with the clerk separately from the facts adduced bearing upon the guilt or innocence of the defendant.

* * * *."

APPENDIX "E"

Art. 1160, *Vernon's Annotated Penal Code of the State of Texas* as amended Acts 1961, Ch. 331, p. 706, 57th Leg.

"Art. 1160. *Assault with intent to murder.*

"Section 1. If any person shall assault another with intent to murder, he shall be confined in the penitentiary for not less than two (2) nor more than twenty-five (25) years, provided that if the jury finds that the assault was committed without malice, the penalty assessed shall be not less than one nor more than three (3) years confinement in the penitentiary; and provided further that in cases where the jury finds such assault was committed without malice but was made with a Bowie knife or dagger as those terms are defined by law, or with any kind or type of a knife, or in disguise, or by laying in wait, or by shooting into a private residence, the penalty shall be doubled."

APPENDIX "F"

Art. 62, *Vernon's Annotated Penal Code of the State of Texas*

"Art. 62. *Subsequent conviction for felony*

"If it be shown on the trial of a felony less than capital that the defendant has been before convicted of the same offense, or one of the same nature, the punishment on such second or other subsequent conviction shall be the highest which is affixed to the commission of such offenses in ordinary cases."

APPENDIX "G"

Art. 847, *Vernon's Annotated Code of Criminal Procedure of the State of Texas.*

"Art. 847. *Presumptions on appeal*

"The Court of Criminal Appeals may affirm the judgment of the court below, or may reverse and remand for a new trial, or may reverse and dismiss the case, or may reform and correct the judgment, as the law and nature of the case may require. The court shall presume that the venue was proven in the court below; that the jury was properly impaneled and sworn; that the defendant was arraigned; that he pleaded to the indictment; that the court's charge was certified by the judge and filed by the clerk before it was read to the jury, unless such matters were made an issue in the court below, and it affirmatively appears to the contrary by a bill of exceptions approved by the judge of the court below, or proven up by by-standers, as provided by law and duly incorporated in the transcript. In each case by it decided, the Court of Criminal Appeals shall deliver a written opinion, setting forth the reason for such decision."

APPENDIX "H"

Art. 28.01, *Vernon's Annotated Code of Criminal Procedure of the State of Texas,* as amended Acts 1965, 59th Leg.

"Art. 28.01. *Pre-trial*

"Sec. 1. The court may set any criminal case for a pre-trial hearing before it is set for trial upon its merits, and direct the defendant and his attorney, if any of record, and the State's attorney, to appear before the court at the time and place stated in the court's order for a conference and hearing. The defendant must be present at the arraignment, and his presence

is required during any pre-trial proceeding. The pre-trial hearing shall be to determine any of the following matters:

* * * *

"(6) Motions to suppress evidence—When a hearing on the motion to suppress evidence is granted, the court may determine the merits of said motion on the motions themselves, or upon opposing affidavits, or upon oral testimony, subject to the discretion of the court;

* * * *"

APPENDIX "I"

Art. 37.07, *Vernon's Annotated Code of Criminal Procedure of the State of Texas,* as amended Acts 1967, 60th Leg., Ch. 659.

"Art. 37.07. *Verdict must be general; separate hearing on proper punishment.*

"1. The verdict in every criminal action must be general. When there are special pleas on which a jury is to find they must say in their verdict that the allegations in such pleas are true or untrue. If the plea is not guilty, they must find that the defendant is either guilty or not guilty, and, except as provided in Section 2, they shall assess the punishment in all cases where the same is not absolutely fixed by law to some particular penalty.

"2. Alternate procedure

"(a) In all criminal cases, other than misdemeanor cases of which the justice court or corporation court has jurisdiction, which are tried before a jury on a plea of not guilty, the judge shall, before argument begins, first submit to the jury the issue of guilt or

innocence of the defendant of the offense or offenses charged, without authorizing the jury to pass upon the punishment to be imposed.

"(b) If a finding of guilty is returned it shall then be the responsibility of the judge to assess the punishment applicable to the offense; provided, however, that (1) in capital cases where the state has made it known in writing prior to the trial that it will seek the death penalty, (2) in any criminal action where the jury may recommend probation and the defendant filed his sworn motion for probation before the trial begins, and (3) in other cases where the defendant so elects in writing at the time he enters his plea in open court, the punishment shall be assessed by the same jury. If a finding of guilty is returned, the defendant may, with the consent of the attorney for the state, change his election of one who assesses the punishment. * * *"

APPENDIX "J"

AFFIDAVIT

I, Joe M. Ingram, after being duly sworn, do depose as follows:

On June 17, 1961, I was the duly elected and qualified Judge of the Eleventh Judicial Circuit of the State of Tennessee and as such presided over the Circuit Criminal Court for Maury County, Tennessee. On that date the defendant, James Burgett, charged by three indictments, being No. 6709, 6710 and 6711, with the offense of forgery. Upon being arraigned in open court he was informed that as provided by Tennessee Law, he was entitled to have legal counsel, and that if he could not afford to employ counsel, the court would ap-

point a lawyer to defend him. Whereupon, he waived his right to counsel and went to trial acting as his own counsel.

JOE M. INGRAM
Circuit Judge

THE STATE OF TENNESSEE
COUNTY OF MAURY

Subscribed to and sworn to before me, this the 8th day of September, 1967.

SAM D. KENNEDY
Notary Public

My commission expires Oct. 11, 1970.

Filed in Court of Criminal Appeals Sept. 11, 1967.
Glenn Haynes, Clerk.

AFFIDAVIT

I, Sam D. Kennedy, after being duly sworn, do depose as follows:

That on June 17, 1961, I was duly appointed and qualified Assistant District Attorney General for the Eleventh Judicial Circuit of Tennessee, that Maury County, Tennessee, was a part of my circuit, and that I was the prosecutor for the state in cases No. 6709, 6710, and 6711, wherein James Burgett was defendant upon charges of forgery. I was present in open court at Columbia, Tennessee, upon such date when the defendant was fully informed by the Circuit Judge, Joe M. Ingram, of his right to counsel and do depose that the defendant, James Burgett, did then and there waive his rights to counsel and agreed that he would represent himself.

SAM D. KENNEDY

STATE OF TENNESSEE
COUNTY OF MAURY

Subscribed to and sworn to before me, this the 8th day of September, 1967.

VIRGINIA PATTERSON
Notary Public

My Commission expires July 12, 1971.

Filed in Court of Criminal Appeals Sept. 11, 1967.
Glenn Haynes, Clerk